

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of MIRON CROSSLEY, Minor.

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellee,

v

MIRON CROSSLEY,

Respondent-Appellant.

UNPUBLISHED
February 11, 2003

No. 236264
Wayne Circuit Court
Family Division
LC No. 00-394468

Before: Saad, P.J., and Zahra and Schuette, JJ.

PER CURIAM.

Following a jury trial, respondent was found guilty of first-degree home invasion, MCL 750.110a(2), assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. The family court sentenced him to juvenile probation. He now appeals as of right. We affirm.

I. Sufficiency of the Evidence

Respondent first argues that the evidence was insufficient to prove that he assaulted the victim with an intent to kill him. In determining whether sufficient evidence has been presented to sustain a conviction, we must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994). The elements of assault with intent to commit murder are “(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder.” *People v Barclay*, 208 Mich App 670, 674; 528 NW2d 842 (1995). Circumstantial evidence and reasonable inferences arising from it may constitute satisfactory proof of the elements of the offense. *Id.* “The intent to kill may be proven by inference from any facts in evidence.” *Id.*

In this case, the victim testified that respondent shot him in the face with a gun at close range, and then fired at him again, but missed. The victim testified that respondent then grabbed a knife and stabbed him repeatedly in the neck, back and arm. Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable the jury to infer that respondent assaulted the victim with an actual intent to kill.

II. Evidence of Respondent's Possession of a Handgun

Next, respondent argues that the trial court abused its discretion in admitting evidence that, before the date of the offense, he was seen in possession of a handgun that was similar to the kind of gun used to commit the offense. We review a trial court's decision regarding the admissibility of evidence for an abuse of discretion. *People v Taylor*, 252 Mich App 519, 521; 652 NW2d 526 (2002). "An abuse of discretion occurs when an unprejudiced person, considering the facts on which the court acted, would conclude that there was no justification or excuse for the court's ruling." *Id.*

"Evidence of a defendant's possession of a weapon of the kind used in the offense with which he is charged is routinely determined by courts to be direct, relevant evidence of his commission of that offense." *People v Hall*, 433 Mich 573, 580-581; 477 NW2d 580 (1989). MRE 404(b) does not preclude the admission of such evidence because such evidence is admissible under MRE 401, independently of MRE 404(b), as direct evidence of the defendant's commission of the charged crime. *Hall, supra* at 583-584. Therefore, the trial court did not abuse its discretion in allowing the evidence.

III. Disclosure of Exculpatory Evidence

Next, respondent argues that reversal is required because the prosecutor failed to provide him with the victim's medical records and the results of a gunpowder residue test, despite a request for this information. A criminal defendant has a due process right to access certain information possessed by the prosecution. *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998). The prosecution has a duty to disclose impeachment material that is favorable to a defendant. *People v Banks*, 249 Mich App 247, 254-255; 642 NW2d 351 (2002). Pursuant to *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963), the prosecution's suppression of evidence requested by and favorable to an accused violates due process where the evidence is material to guilt, irrespective of the good faith or bad faith of the prosecution. *Banks, supra* at 254. In order to establish a due process violation under *Brady*, an accused must prove: (1) that the state possessed evidence favorable to the accused; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. *Lester, supra* at 281-282.

Here, the record reveals that respondent did in fact obtain the victim's medical records and admitted them into evidence. Accordingly, he has not established a *Brady* violation with respect to the medical records. Regarding the gunpowder residue test results, the record does not establish that these results were available to the prosecution in time for trial. The gunpowder test results were completed March 14, 2001. Defendant rested his case at 12:00 p.m. on the same day. There is no indication that the gunpowder test results were completed and given to the prosecution before noon on that day. Thus, respondent has not shown that the prosecution possessed this evidence and withheld it from defendant. Furthermore, in light of the victim's testimony identifying respondent as the person who shot him, and because the test results would merely show, at best, that respondent did not have gunpowder residue on his hands at the time he was tested (and not necessarily that he did not fire a gun), there is no reasonable probability that

the outcome of the proceedings would have been different had the test results been provided. Accordingly, defendant has failed to show a due process violation warranting reversal.

IV. Ineffective Assistance of Counsel

Finally, respondent argues that he was deprived of the effective assistance of counsel. In order to preserve the issue of effective assistance of counsel for appellate review, the defendant must move for a new trial or an evidentiary hearing in the trial court. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000). Where the defendant fails to create a testimonial record in the trial court with regard to his claims of ineffective assistance, appellate review is foreclosed unless the record contains sufficient detail to support his claims. *People v Dixon*, 217 Mich App 400, 408; 552 NW2d 663 (1996). “If review of the record does not support the defendant’s claims, he has effectively waived the issue of effective assistance of counsel.” *Sabin, supra* at 659. In the present case, defendant failed to move in the trial court for an evidentiary hearing or a new trial. Therefore, our review is limited to the facts on the existing record. *Id.*

To establish ineffective assistance of counsel, a defendant must show that: (1) the performance of his counsel was below an objective standard of reasonableness under the prevailing professional norms, and (2) the representation was so prejudicial to him that he was denied a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). In applying this test, the reviewing court indulges a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance, and defendant bears the heavy burden of proving otherwise. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). A defendant must overcome a strong presumption that the assistance of counsel was sound trial strategy. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Under the first prong of the test, the alleged errors must be so serious that counsel was not functioning as the “counsel” guaranteed by the Sixth Amendment. *Id.* Under the prejudice prong, the defendant must demonstrate a reasonable probability, that but for counsel’s unprofessional errors, the result of the proceeding would have been different. *Id.* “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*, quoting *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Here, respondent contends that his trial attorney was deficient by failing to ensure that he received the victim’s medical records and the gunpowder residue test results. As noted previously, however, counsel did in fact receive the medical records and admitted them into evidence. In regard to the test results, the record shows that counsel told the prosecutor that he needed the test results and obtained the prosecutor’s commitment to check to see if the test results were ready. There is no indication on the record that the test results were completed and available before the close of proofs. Therefore, we cannot conclude that counsel’s performance was deficient.

Respondent also contends that his trial counsel was deficient for failing to secure a critical witness for trial. A decision regarding whether to call a witness is presumed to be a matter of trial strategy. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). In this case, the record shows that counsel attempted to introduce the witness’ desired testimony, but the court refused to admit it. Although the trial court provided counsel with an opportunity to submit further authority on the admissibility of the witness’ testimony, defendant on appeal

offers no explanation for why the court's ruling was erroneous, or what further authority counsel should have presented. On this record, we cannot conclude that respondent was deprived of effective assistance of counsel.

Affirmed.

/s/ Henry William Saad
/s/ Brian K. Zahra
/s/ Bill Schuette